In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 492

MCFADDIN EXPRESS, INC., ET AL., PETITIONERS

v.

THE ADLEY CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's order of November 15, 1965, inviting the Solicitor General to submit the views of the United States.

A consolidation or merger of motor common carriers subject to the Interstate Commerce Commission's jurisdiction requires the Commission's approval. 49 U.S.C. 5. Pending determination of an application for such approval, however, the Commission

> may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction of or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public. [49 U.S.C. 310a(b).]

Petitioner McFaddin and respondent Adley, both motor carriers subject to the ICC's jurisdiction, entered into a contract for the acquisition of McFaddin by Adley, conditioned on obtaining the ICC's approval as required by § 5. An application for temporary operating control of McFaddin by Adley under § 310a (b) was also filed, and granted by the Commission in an order reciting that approval was being given "upon the terms and conditions set forth in the agreement filed with the application." (Pet. App. 11-12, n. 2.) The agreement referred to in the order was a management agreement defining the relationship of the parties during the period of temporary control.

The Commission ultimately disapproved the proposed consolidation. 93 M.C.C. 378. McFaddin thereafter brought this action against Adley alleging that the latter had breached the management agreement—and, indeed, had destroyed McFaddin as a going concern—thereby violating the Commission's § 310a(b) order. Damages and other relief were sought. The

district court dismissed the action for want of federal jurisdiction. 240 F. Supp. 791 (D. Conn.). The court of appeals affirmed. 346 F. 2d 424 (C.A. 2).

1. We believe it arguable that the federal courts have jurisdiction in cases of this type. The argument in support of this result would proceed along the following lines. Effectuation of the policy of § 5 of the Interstate Commerce Act—which gives the Commission broad authority over consolidation of motor carriers—requires that a proposed acquiring firm not be permitted to dissipate the assets of the proposed acquired firm under a temporary control arrangement, thereby making difficult or impossible the restoration of the latter as a viable independent carrier should the proposed consolidation ultimately be disapproved by the Commission. If there is no effective check upon such abuses of the temporary control procedure, either the Commission must cease approving § 310a(b) applications altogether—contrary to the expressed intent of Congress—or motor carriers may be able to circumvent the Commission's regulatory powers under § 5. For this reason, it seems clear that the Commission has the authority to condition its approval of temporary control upon the applicant's adherence to a management agreement designed to preserve the assets of the motor carrier proposed to be acquired. Arguably, the Commission exercised that authority here in expressly basing approval of Adley's temporary control of McFaddin upon the terms and conditions of the agreement which had been filed with the application. If so, a breach

of such terms and conditions—which petitioners alleged as the basis of their suit—would be a violation of the Commission's § 310a(b) order. The remaining question is whether the federal courts are authorized to grant the relief sought by petitioners.

The Interstate Commerce Act visits both criminal (49 U.S.C. 322(a)) and civil (§ 322(b)) penalties upon violations of orders issued pursuant to § 310a (b). In addition, the Commission is authorized by § 322(b) to bring federal district court proceedings "to enforce obedience" to such orders. But nowhere does the statute expressly authorize a right to sue for damages. Nonetheless, in appropriate circumstances the federal courts will infer private rights and remedies from a federal regulatory statute. See, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426; *Tunstall* v. *Brotherhood*, 323 U.S. 210. Here, it may be argued that recognition of a right to seek damages for breach of a § 310a(b) order of the ICC would not undermine the regulatory objectives of the Interstate Commerce Act (cf. *Hewitt-Robins* v. *Freight-Ways*, 371 U.S. 84), and indeed might promote them, by supplying an additional deterrent to violation of the provisions of management agreements entered into under § 310a (b).

If a right to seek damages for breach of an order approving temporary control may thus be inferred from that section, the district court clearly had jurisdiction of petitioners' action. For a suit to enforce such a right is one "arising under" an "act of Congress regulating commerce," and the federal courts

have jurisdiction of such actions under 28 U.S.C. 1337.

2. As the foregoing discussion indicates, the question whether the court below properly rejected petitioners' claim of federal jurisdiction is not free from doubt. Moreover, another court of appeals has indicated a different view of jurisdiction from that of the court below, albeit with respect to an order entered under another provision of the Interstate Commerce Act. *Florida East Coast Ry. Co.* v. *Jacksonville Terminal Co.*, 328 F. 2d 720 (C.A. 5), certiorari denied, 379 U.S. 830. On the other hand, the problem appears not to be one of great frequency or importance, and the government agency most directly concerned—the Interstate Commerce Commission—does not believe that the result reached by the court below is demonstrably unsound or that review by this Court is warranted. In denying approval of the proposed consolidation here, the Commission indicated its view that disputes over temporary control under § 310a(b) ordinarily do not involve questions of importance from the standpoint of national transportation policy, and therefore are more appropriately left to private adjustment under local law. See 87 M.C.C. 665, 667; 93 M.C.C. 378, 382; Pet. App. 9, n. 1. Accordingly, the Commission perceives no need to recognize a federal cause of action, at least where (as in the present case) the Commission's § 310a(b) order does not in terms command obedience to, albeit it predicates Commission approval upon, the terms and conditions of the management agreement. It should also

be pointed out that a federal damages remedy here would largely duplicate the State remedy of a suit for breach of the management agreement and that neither the language nor legislative history of § 310a (b) affirmatively discloses an intent to protect persons harmed by the breach of such agreements. Compare *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 432.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

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